IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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In the Matter of the Amendment

of the

Hawaiʻi Probate Rules

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ORDER AMENDING THE HAWAIʻI PROBATE RULES
(By: Moon, C.J., Levinson, Nakayama, and Acoba, JJ.,
and Intermediate Court of Appeals, Chief Judge Burns,
assigned by reason of vacancy)

IT IS HEREBY ORDERED that the following amendments are made to the Hawaiʻi Probate Rules, effective July 1, 2003, as follows (deleted material is bracketed, new material is underlined):

1. Paragraph (c) of Rule 10 is amended as follows:

> **(c) Time to File Pleadings or Reports.** A party objecting or responding to a petition must file the objection or response with the court and serve it on interested persons within 30 days [of] after service of the petition and notice of hearing, or in the case of an informal application, within 14 days [of] after service of any application under HRS § 560:3-302(b), except when a different time is prescribed by statute or court order. Unless otherwise ordered by the court, the court-appointed master shall file a report with the court and serve a copy of the report on all counsel who have appeared in the proceeding, within 30 days after the date the master was appointed or within 30 days after the date responses to the petition are due, whichever is later. Any party objecting or responding to the master's report shall file a petition to reject or confirm, in part or in whole, the report and shall serve the petition on all counsel who have appeared in the proceeding within 10 days after the date the master's report is filed. Any party objecting or responding to such a petition shall file the objection or response and serve it on all counsel who have

appeared in the proceeding, within 20 days after the date the master's report is filed. In all other cases and unless otherwise ordered by the court, any party objecting or responding to a guardian ad litem's or [pleadings in response to a response or objection, and guardian ad litem,] Kokua Kanawai's[, and master] report[s], shall file a petition to confirm or reject the report [be filed with the court] and shall serve[d] it on all counsel for parties who have appeared in the proceeding no less than 72 hours prior to the time set for the hearing as originally set. [All] Any party filing a responsive pleading[s] shall also [be] serve[d] it on all other interested persons who have not filed a waiver of notice, even though service may not be completed before the time set for the hearing, and shall deliver a copy of the file-marked pleading [shall be delivered] to the presiding judge's chambers.

The court for good cause may shorten the time requirements of these rules to effectuate the speedy and efficient administration of estates.

2. The Commentary to Rule 23 is amended as follows:

***COMMENTARY:***

*This rule establishes, for the guidance of counsel, the situations in which ex parte proceedings are appropriate.*

*¶Under paragraph (a) of this Rule 23, a petition may be granted when all persons entitled to notice of the petition join in the petition; this may differ from [the interested] persons described as "interested persons" under HRS § 560:1-201 either because a statute may not require notice to all interested persons[. For] (for example, see HRS § 560:3-403(a)[,] which [limits] requires notice to certain individuals [(excluding] but not to creditors)[.], or because the particular matter being heard does not affect the interests of a person who is statutorily defined as an interested person (for example, an unpaid creditor remains an interested person until his or her claim is resolved, but that interest is not affected by a challenge to the validity of a will or codicil since it matters not to the creditor whether the debtor/decedent died testate or intestate. It must be kept in mind that a person who is an interested person at the outset of a probate may lose his or her status as such when his or her interest has been resolved. For example, a specific devisee who has received his or her devise or an heir who is not a*

*beneficiary of a will is an interested person at the hearing on the petition for probate, because denying the petition and declaring an intestacy will result in an inheritance passing to the heir. Such an heir loses his or her status as an interested person once the will is admitted to probate, because a consequence of the admission of the will to probate is that he or she will not share in the decedent's estate.*

*¶Differentiating between emergency ex parte petitions in paragraph (b) of this Rule 23 and those for which notice and hearing are just being waived will facilitate document handling by the court and help expedite processing of emergency documents.*

3. The Commentary to Rule 53 is amended as follows:

***COMMENTARY:***

*This rule clarifies the effect of the filing of a waiver of notice or joinder. If a waiver of notice is filed, the waiver shall apply to all regular filings except as may be specifically provided in the waiver. (For example, a beneficiary may waive notice of all proceedings except those relating to disposition of real property.) In all cases, interested persons must receive a copy of the final accounting, must receive notice of proceedings relating to real property that the beneficiaries would otherwise receive, and must receive a copy of the inventory (and any amendments or supplements)[, because the statutory fees are based on the inventory values].*

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4. Rule 56 and the Commentary are amended as follows:

**Rule 56. WHEN APPROPRIATE.**

An interested person may seek appointment of a special administrator where necessary to preserve the estate or to secure its proper administration, including but not limited to situations where:

**(a)** the existence of assets to be probated is uncertain, and an administrator is required to locate or identify assets, including investigating the merits of pursuing a lawsuit or claim for relief; or

**(b)** no probate assets exist, but an administrator is necessary either to complete an action of the deceased or to act on behalf of the deceased or the deceased's estate (other than receipt of no-fault

insurance benefits), including but not limited to releasing legal or equitable interests of the deceased and executing documents in pending or threatened litigation [involving] where the deceased is a defendant; or

**(c)** for some reason, a probate cannot be opened rapidly enough to allow the commencement of a lawsuit before the running of the statute of limitations or the filing of a response or objection in cases where the deceased or the estate is a defendant; provided, however, that the special administrator's authority under this paragraph (c) shall be limited to a period of no longer than six (6) months, and a personal representative must be appointed prior to obtaining court approval of any settlement; or

[**(c)**] **(d)** an emergency or other situation exists such that the estate will be prejudiced unless a special administrator is appointed pending appointment of a personal representative; or

[**(d)**] **(e)** objections have been filed to the probate of a will or to the appointment of a personal representative, and it is advisable to appoint a special administrator to administer the estate with the powers of a personal representative, but not with the power of distribution, pending resolution of the objections; or

[**(e)**] **(f)** a conflict of interest arises or a situation develops where the personal representative cannot or should not act temporarily, and a special administrator is appointed for the specific purpose of either resolving the conflict issue or temporarily acting until the personal representative can resume full powers.

All petitions seeking the appointment of a special administrator shall set forth the grounds for seeking the appointment.

***COMMENTARY:***

*Many practitioners are uncertain of the proper use of a special administration, and some have, once a special administration is established, attempted to run a complete probate without having a personal representative appointed. This rule provides guidance as to the appropriate situations in which a special administrator should be appointed.*

*Paragraphs (a)-[(c)](d) of this Rule 56 describe the most common situations giving rise to the*

*appointment of a special administrator. Paragraph (a) allows the appointment of a special administrator to track down assets, since many times financial institutions are reluctant to release information about a deceased's assets except to a court-appointed official. Paragraph (b) covers the situation where a lawsuit was threatened or pending <u>against the defendant</u>, but in settlement no assets will be paid to the probate estate, and therefore the special administrator is only required for purposes of signing documents (after court approval) and binding the deceased's estate; it does not allow a Special Administrator to collect no-fault benefits where no probate assets exist. Paragraph (b) also covers the situation of a deceased whose signature is required to sign a mortgage release or deed in satisfaction of agreement of sale or similar equitable document. <u>Paragraph (c) covers the situation where a civil action is filed by or on behalf of the estate or the heirs or a suit is filed against the deceased or his or her estate. In most instances, informal probate can be opened rapidly enough that special administration should be unnecessary. If, however, the nominated personal representative is not a close family member, informal probate may take too long if the statute of limitations on the claim is about to expire or a response or objection must be filed. In those situations, appointment of a special administrator is appropriate, but a probate should be opened as soon as possible, and so the time allowed for special administration and the power of the special administrator are limited.</u> Paragraph [(c)]<u>(d)</u> covers the situation where there are probate assets and a personal representative's appointment is to be sought, but the estate will be prejudiced if no one is authorized to act on behalf of the estate in the meantime. Examples of this situation would be to track down a will, identify heirs or beneficiaries, sign tax returns on behalf of the deceased or estate, and many others.*

*Paragraphs [(d)]<u>(e)</u> and [(e)]<u>(f)</u> address the need for a special administrator when the regular probate proceeding has been commenced. Under paragraph [(d)]<u>(e)</u>, a special administrator may be appointed where a will contest or objections to the appointment of a specific individual as personal representative have been filed; rather than hold up administration of*

*the estate pending resolution of the contested matter, a special administrator can be appointed with all powers of a personal representative except for the power of distribution.*

*Paragraph [(e)]<u>(f)</u> clarifies that a special administrator may be appointed even though a personal representative has been appointed and is acting where, for a limited period or with respect to a specific issue, the personal representative cannot or should not act. For example, if the personal representative has filed a creditor's claim against the estate, a special administrator may be appointed for the sole purpose of evaluating, allowing or disallowing, and defending the claim, while the personal representative can continue to serve on other issues. Another circumstance where paragraph [(e)]<u>(f)</u> might apply is where the personal representative is physically incapacitated temporarily (such as by hospitalization), but will be able to resume [its] <u>his or her</u> duties in the future.*

5. Rule 66 and the Commentary are amended as follows:

**Rule 66. AUTHORIZATION TO OFFER REAL PROPERTY FOR SALE.**

A personal representative shall petition the court for authorization to offer for sale real property belonging to the estate if such [power of sale] <u>a petition</u> is [not granted] <u>required</u> by the deceased's will[.] <u>or is demanded by a devisee in a testate probate proceeding or by an heir in an intestate probate proceeding.</u> If <u>all</u> the beneficiaries<u>,</u> [or, if any, devisee or heir,] <u>devisees or heirs</u> who would otherwise be entitled to take the property absent a sale join in a petition for authorization to sell, then such authorization may be granted on an ex parte basis. If all such beneficiaries do not join in the petition, the court shall set the petition for hearing with notice to all beneficiaries who would otherwise be entitled to take the property absent a sale.

***COMMENTARY:***

*HRS § 531-28.5 <u>no longer</u> requires a personal representative to obtain authority to offer real property for sale [unless] <u>if</u> the <u>decedent's</u> will [contains] <u>is silent as to</u> such authority. <u>But the personal representative must petition the court for such authority if required by the will or demanded by a</u>*

*devisee in a testate probate proceeding or by an heir in an intestate probate proceeding. This rule clarifies that such authority can be granted on an ex parte basis if all interested persons join in the petition for authorization. This rule does not eliminate the need for a confirmation of any sale if required under HRS § 531-29.*

6. The Commentary to Rule 89 is amended as follows:

***COMMENTARY:***

*A personal representative has the authority to transfer assets of the estate, including real property, without court order, except under certain circumstances with respect to the [in the event of] sale of real property. HRS § 560:3-715. [However, t]The Land Court statute, HRS § 501-171(a), provides for the [requires any] transfer of an interest in real property from a probate estate to be supported by a court order of distribution, but no corresponding provision [No such requirement] exists for Regular System property. In order to maintain consistency in probate court practice and procedures, this rule provides for [requires] an order terminating possession of property for all transfers during the administration of an estate, except those resulting from a sale (covered by other rules) or at termination and final distribution of the estate (covered by the order approving final accounts.)*

7. Rule 92 and the Commentary are amended as follows:

**RULE 92. TRANSFER OF TYPE OF PROCEEDING.**

When a personal representative discovers after the commencement of a proceeding that the assets of the estate are greater in amount than originally thought, and that the value of the assets thereby exceeds the proper jurisdictional amount for a small estates [the type of] proceeding [originally used], the personal representative shall petition the court for change to informal, formal, or supervised proceedings [the new procedure]. Likewise, where the assets of the estate are less than originally thought, the personal representative in his or her discretion may petition the court for change to a small estates [an appropriate] proceeding [for the smaller jurisdictional

amount]. In the event that the notice requirements for the new procedural level [differ from] are more stringent than the notice requirements originally followed, the more stringent requirement shall be satisfied prior to the court granting the petition.

***COMMENTARY:***

*This rule simplifies the transfer of a proceeding from small estates to informal or supervised and vice versa. With the use of a single case number under Rule 50 for all proceedings relating to a particular deceased, no petitions to terminate one level of proceeding and transfer of documents to new files will be necessary, as all factual data and prior determinations can remain in effect. The rule recognizes that notice requirements may be different for different levels of proceedings [(such as the one-time publication requirement for estates under $20,000 compared to the three-time publication requirement for all other estates)] and therefore requires that the more stringent requirement be satisfied. For example, there is a one-time publication requirement for estates under $10,000 compared to the three-time publication requirement for estates subject to supervised proceedings. In addition, if an estate is opened informally, there is no publication requirement. If it is desirable to close the estate formally before the statute of limitations provided in HRS § 560:3-108(a)(3) has expired, publication would be required prior to the submission of the Petition for Approval of Final Accounts.*

8. Rule 94 and the Commentary are amended as follows:

**RULE 94. DISCLAIMERS.**

A person who desires to disclaim an interest in property shall comply with the delivery and filing requirements of HRS § 526-12 [devolved to the person under a testamentary instrument or by the law of intestacy shall file the disclaimer in the probate estate of the deceased. A person disclaiming an interest in property devolved under a non-testamentary instrument or contract may also file the disclaimer in the probate estate of the deceased, as set forth in HRS § 560:2-801(b)(2)]. If no probate estate has been opened for the deceased, the person shall file the disclaimer with the court having jurisdiction if there

had been a probate estate, as provided in HRS § 526-12(c)(2) or (d)(2), and the clerk shall accept the document without court order and assign a P. No. to the disclaimer, which P. No. shall be used in any later proceedings regarding the deceased. Upon receipt of a disclaimer, the Personal Representative or Trustee may file the document in the probate or trust proceeding.

***COMMENTARY:***

*[The rule provides that a disclaimer is to be treated the same as a demand for notice or deposit of will, simply accepted by the clerk without court order and assigned a P. No. It is unclear what the appropriate filing fee would be, but it may be that for commencing a probate (currently $30). A special proceeding fee of $100 appears excessive, given that the court merely accepts the document for filing. However, fee schedules are set by statute, and therefore the rule does not address the issue of the appropriate fee. (Note that if a probate has been started, there would be no fee charged for filing a disclaimer.)]*

*Even though HRS § 526-12 does not require that the Personal Representative or Trustee or disclaimant file a disclaimer with the court, the fiduciary or disclaimant may desire to do so in order to have independent proof of the date the disclaimer was made for estate tax purposes. HRS § 526-15 permits recordation or filing of a disclaimer, and the rule acknowledges that the fiduciary or disclaimant can file the disclaimer in the probate or trust proceeding.*

9. New Rule 95 is added as follows:

**RULE 95. ACKNOWLEDGMENT OF AUTHORITY.**

**(a) Application.** To obtain an Acknowledgment of Authority pursuant to HRS. §560:4-205, a domiciliary foreign personal representative shall file with the Registrar (1) an Application for Issuance of Acknowledgment of Authority signed by the foreign personal representative or its counsel verifying the foreign personal representative's appointment in the decedent's domicile and requesting the issuance of an Acknowledgment of Authority, and (2) certified copies of the foreign personal representative's Letters Testamentary or Letters of Administration, along with a certified copy of any official bond. A domiciliary

foreign personal representative appointed in a country other than the United States, shall file with the Letters Testamentary or Letters of Administration and bond, (i) an authentication pursuant to Rule 15(a)(2) of the Hawai‘i Probate Rules, and (ii)a translation of any non-English documents pursuant to Rule 15(d) of the Hawai‘i Probate Rules.

**(b) Acknowledgment.** If the Application for Issuance of Acknowledgment of Authority is approved by the Registrar, the Registrar shall issue an Acknowledgment of Authority, which shall expire three years from the date of issuance, and such limitation shall be stated on the face of the acknowledgment of authority.

10. Rule 103 is amended as follows:

**RULE 103. FLAG SHEETS.**

[Three] An original and no fewer than two copies of flag sheets in the form ordered by the court shall be presented to the clerk of the court for all hearings to appoint a guardian of the property, to compromise a tort claim on behalf of a minor or incapacitated person, and to confirm the sale of real property. These flag sheets [shall conform to the requirements of Rule 4 and] shall be presented to the court no later than ten days prior to the scheduled hearing. Flag sheets shall not be file-marked as a pleading but shall be date-stamped by the clerk and placed in the court file for reference. Failure to present a required flag sheet in time shall cause the hearing to be continued to the next available date. Where the facts of the case as set forth in the flag sheet change after submission of the flag sheet to the court, an amended flag sheet shall be presented.

11. New Rule 104.1 is added as follows:

**RULE 104.1. DEMAND FOR NOTICE.**

**(a) Preparation and Filing: Guardianship.** A person filing a Demand for Notice shall set forth the name of the protected person, any known aliases, the nature of the interest of the demandant in the estate, and the address of the demandant or the demandant's attorney. The clerk of the court shall assign a G. No. to the Demand for Notice if no proceedings have been

commenced for the protected person's estate or the G. No. for the protected person's estate if proceedings have already commenced.

**(b) Duty to Investigate: Demandant.** Prior to filing a demand for notice in other than a pending guardianship proceeding, the demandant shall make a diligent search of the records of the circuit court in which the demand is being filed to determine whether guardianship proceedings have previously been filed and shall state in the Demand for Notice that such search has been conducted.

**(c) Duty to Investigate: Petitioner.** Prior to filing a petition to commence a guardianship proceeding, the petitioner shall make a diligent search of the records of the circuit court in which the petition is being filed to determine whether a demand for notice has been filed with respect to the protected person.

**(d) Validity of Demand.** A Demand for Notice filed other than in a pending guardianship proceeding shall be effective for a period of five years from the date of filing. A Demand for Notice shall be effective only for the circuit in which it is filed.

12. Rule 118 and the Commentary are amended as follows:

**RULE 118. SPECIAL GUARDIANSHIPS AND PROTECTIVE ARRANGEMENTS.**

When a special guardian has been appointed on an ex parte basis, unless otherwise provided by court order, the authority of the special guardian terminates automatically 90 days after the issuance of the letters of special guardianship, unless there is then pending before the court a petition for appointment of a permanent guardian or a petition to extend the appointment of the special guardian for good cause, in which case the special guardian's appointment continues until the court orders otherwise. A special guardian whose powers are terminated automatically shall account to the court for his or her actions.

***COMMENTARY:***

*If a special guardianship or protective arrangement is established on an ex parte basis and a need for a permanent guardian is evident, the protected person must be given rights to due process to challenge the guardianship imposed without notice or hearing.*

*This rule forces a special guardian to promptly file for permanent guardianship or face automatic termination after 90 days, thereby giving the protected person the opportunity to challenge the proceedings. If a permanent guardianship petition or a petition to extend the special guardian's appointment is pending, the special administrator's authority is extended until further court order.*

*Ideally, where the need for a permanent guardian is evident, all ex parte petitions for appointment of a special guardian [where continued administration is anticipated] will be accompanied by the petition for appointment of a permanent guardian, so that there are no delays in determining the rights of the protected person. Other situations may arise where where there is no need for a permanent guardian, but the original 90 day period is not sufficient for the special guardian to complete his or her duties, and the special guardian's appointment may be extended by the court for good cause.*

13. Paragraph (e) of Rule 126 and the Commentary are amended as follows:

**(e) Distribution of Assets to Missing Beneficiaries.** When a trustee is unable to locate a beneficiary entitled to mandatory distribution of income or principal, the trustee may deposit the assets with the clerk of the court by complying with the requirements of Hawaii Revised Statutes § [531-34] 560:3-914. The Trustee shall include with the instrument accompanying the deposit an affidavit describing all efforts taken by the trustee to locate the beneficiary. The clerk of the court shall designate any deposit received by the clerk pursuant to this rule with the same T. No. assigned to the petition. Trust deposits under this rule for more than one beneficiary shall all be filed under the same T. No., which in its caption shall refer to the trust from which the distributions were made.

***COMMENTARY:***

*There have been problems in the past with the clerk of the court declining to accept an attempted deposit pursuant to HRS § [531-34] 560:3-914 without a court order even though no order is required by the*

*statute. This rule clarifies that the deposit procedure is an administrative matter and that a court order is not necessary. However, to discourage trustees from taking advantage of the deposit system, subsection (d) of this rule requires the trustee subject to court approval of accounts to maintain current records on current and future vested beneficiaries and this subsection requires all reasonable efforts to be pursued to locate the beneficiary prior to deposit. The efforts required to locate the beneficiary are dependent upon the value of the assets involved, but at a minimum should include inquiry of all other beneficiaries as to their knowledge of the location of the missing beneficiary. Additional efforts might include publication of notice both in the State of Hawaii and in the jurisdiction in which the beneficiary last resided, according to the trustee's records, and hiring of a private investigator or beneficiary-search firm.*

*The rule further clarifies that a Petition for Deposit must be presented to the clerk of the court, which is then filed under the original case number for the trust, or if none has been assigned, under a newly-issued T. No. which will thenceforth be used for any other deposits with the clerk for that trust. In this way, the deposit is indexed under the name of the trust where a lost beneficiary is likely to look.*

14. The Commentary to Rule 140 is amended as follows:

***COMMENTARY:***

*The no-fault statutes provide no guidance on how a legal representative is to be appointed. This rule clarifies the steps to take.* *Rules 140 through 144 apply only to accidents that occurred or proceedings begun before January 1, 1998. See Act 251 §§ 41, 61, 1997 Haw. Sess. Laws at 538-40 and 551.*

DATED: Honolulu, Hawai‘i, June 25, 2003.